No. 3811

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

W. EVERETT, JOHN R. SORENSEN, H. HANSEN, B. JACOBSON, A. G. LARSEN, I. C. SORENSEN, P. HANAN, EARL SIMMONS, WALTER STARKEY, DONALD SMITH, GEORGE CORRON, ALEXANDER EASTGATE, W. MURPHY, J. AMUNDSON, GEORGE J. SMITH, JAMES RAY, E. GAUPHOLM, G. H. BEAUCHAMP, FRANK HOMAN, O. F. BOSTRONN, L. E. OBLOM And P. SOGNEFEST,

Appellants,

vs.

THE UNITED STATES OF AMERICA AND THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, A CORPORATION,

Appellees.

Appeal from the United States District Court for the Western District of Washington, Northern Division, sitting in admiralty. Hon. Jeremiah Neterer, Judge.

BRIEF OF APPELLANTS.

JAMES KIEFER,
Proctor for Appellants.

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STATEMENT OF THE CASE.

The appellants, in these proceedings, seek to recover from the master and from the United States and the United States Shipping Board Emergency Fleet Corporation, the balances of wages due them as officers and seamen on the S. S. Agron, a merchant vessel owned by the United States and represented by the United States Shipping Board Emergency Fleet Corporation. There is no dispute as to the amounts due appellants nor is there any

dispute as to the ownership of the vessel. The sole and only question is as to the liability of the Government and the United States Shipping Board Emergency Fleet Corporation as owner.

On the 5th day of March, 1920, the Government was the owner of the incompleted wooden hull of the S. S. Agron, and on that day entered into an executory agreement for the sale of the hull and the furnishing of materials for its completion by the National Oil Company. The pertinent parts of this agreement will be printed in our argument. Delivery was made and the vessel completed and documented June 7, 1920, in the name of the United States represented by the United States Shipping Board Emergency Fleet Corporation. On that day practically all of the appellants signed articles with Tory Hedemark appearing thereon as master, for a voyage to Australia not exceeding twelve months, and return to a port of discharge in the United States.

The vessel returned as far as the Canal Zone, and was there libeled for salvage at the instance of the Shipping Board, as appears from Exhibit G attached to the original Agreed Statement of Facts, and finally condemned and sold, paying about forty-four (44) per cent of the wages, and the appellants herein seek to recover the balance due them.

The trial court made Findings of Fact establishing the amounts due the appellants, respectively, and entered a decree against the respondent Tory Hedemark for said amounts, but dismissed the libels as to the respondents United States and the United States Shipping Board Emergency Fleet Corporation, upon the ground that the National

Oil Company, through its subsidiary, the National Oil Transport Company, employed the master, Hedemark, who in turn employed the seamen, and that as to the seamen the National Oil Company is to be regarded as owner *pro hac vice.*

ASSIGNMENTS OF ERROR.

I.

The Court erred in admitting in evidence respondent's United States Shipping Board Emergency Fleet Corporation Exhibit "A", being a contract between the National Oil Transport Company and Universal Shipping & Trading Company, dated May 25, 1920.

II.

The Court erred in admitting the evidence of the witness Alexander Matthews, a witness on behalf of the respondents United States and United States Shipping Board Emergency Fleet Corporation, over the objection and exception of the libelants.

III.

The Court erred in holding, decreeing and adjudging that the libels of the libelants, and each of them, be dismissed as against the respondents the United States and the United States Shipping Board Emergency Fleet Corporation, and that the libelants, and each of them, take nothing thereby as against said respondents United States and United States Shipping Board Emergency Fleet Corporation.

IV.

The Court erred in making and entering that certain decree, wherein and whereby it was decreed

that the several libels of the several libelants be dismissed, and that the said several libelants take nothing thereby as against the respondents the United States and the United States Shipping Board Emergency Fleet Corporation.

V.

The Court erred in holding and concluding as a matter of law that the United States and the United States Shipping Board Emergency Fleet Corporation were not the owners of the S. S. Agron, and not liable for the wages of the several and sundry libelants herein, and in dismissing the several libels of the several libelants with prejudice as against the said respondents United States and the United States Shipping Board Emergency Fleet Corporation.

ARGUMENT

For the sake of convenience and brevity throughout this brief, we will refer to the United States and the United States Shipping Board Emergency Fleet Corporation as the appellees, and in case of specific reference to the United States Shipping Board Emergency Fleet Corporation, we will refer to it as the Fleet Corporation.

We will first discuss what appears to us to be the controlling question in the case, and that is this:

IN THE STATE OF THE RECORD IS THE REGISTERED OWNER, ADMITTEDLY THE ACTUAL OWNER, LIABLE IN PERSONAM FOR WAGES OF APPELLANTS?

In the decision found in the record at page 16, the trial court exonerated appellees upon the theory

that the National Oil Company, through its subsidiary the National Oil Transport Company, was the owner of the S. S. Agron *pro hac vice.*

The relation of the National Oil Company to the vessel must, as we view it, be determined from the contract entered into between appellees and the National Oil Company. As the record has not been printed, we here reproduce the pertinent and controlling portions of the contract. It is between the Shipping Board and the Fleet Corporation, as representing the United States, and the National Oil Company, a New Jersey corporation, termed the buyer, and proceeds:

"1. That the Fleet Corporation hereby agrees to sell to the buyer and the buyer hereby agrees to purchase from the Fleet Corporation the following uncompleted wooden hulls * * * No. 2678 'Agron' (twin screw) together with (material for the completion thereof) * * *.

(a) The purchase price of each of said hulls should be the sum of $70,000.00.

(b) The purchase price of each of the said bills of material No. 500 shall be the sum of $85,000.00 with proper deduction for such items as the Fleet Corporation is unable to deliver.

2. Immediately upon the execution of this agreement, the Fleet Corporation agrees to deliver into the custody of the buyer the said five (5) hulls and five (5) bills of materials No. 500. The buyer shall accept delivery of the said hulls and bills of material where they are now, in Pacific Coast Storage, and it is expressly agreed that the said hulls and bills of material are delivered into the custody of the buyer for the sole purpose of completion thereof by the buyer; and the buyer agrees at its own expense to complete the same at the earliest date possible consistent with good workmanship.

It is expressly agreed that the title to the said hulls and bills of materials and any additions or improvements made thereto shall remain in the Fleet Corporation until the same shall be completed and documented and the buyer shall have executed the mortgage and notes hereinafter provided for. From the time of delivery of said hulls and/or bills or material to the buyer, the buyer hereby agrees to keep the said hulls and/or bills of material free from all liens and incumbrances and to keep the same insured against fire and/or builder's risks at the full value thereof, all policies to be payable to the Fleet Corporation and/or to the buyer as their interests may appear, and the binders or policies to be delivered to the Fleet Corporation.

3. The buyer agrees to pay the purchase price of each of said hulls and sets of machinery to the Board in gold coin of the United States, or its equivalent in current funds as follows:

Upon the completion and documentation of each of said hulls, the buyer agrees to execute and deliver to the Board a first mortgage on said vessel in the Board's Standard Form, said mortgage to secure the payment of the actual amount determined due the Fleet Corporation as shown in sections 'a' and 'b' of Paragraph I, payable in eight (8) equal semi-annual installments, the first installment payable six (6) months from the date of completion of said vessel. All payments shall bear interest at the rate of five (5) per cent per annum from the date of this contract and shall be represented by promissory notes of the buyer."

(Followed by attestation clause and signatures of Shipping Board and Fleet Corporation and National Oil Company.)

It is admitted that this contract was never recorded in any public office, and that the S. S. Agron was completed and outfitted by the National Oil Company, operating through its representatives

or contractors, and that no mortgage was ever executed.

The vessel was documented June 7, 1920, in the name of the United States, represented by the Fleet Corporation, and Certificate of Registry incorporated in the original Agreed Statement of Facts shows Tory Hedemark as master.—(Record 9.)

The only evidence to connect the National Oil Transport Company with the vessel in any way is the stipulation found at page 15 of the record, and to the consideration of which appellants objected. There is, it is true, the testimony of Matthews that he corresponded with both companies, and there is the contract, Fleet Corporation Exhibit A, between the National Oil Transport Company and the Universal Shipping & Trading Company, all of which went in over the exception and objection of appellants.

It is the contention of appellants that there is nothing in the record to show any contract relation between the S. S. Agron and the National Oil Transport Company. The record is bare of any evidence showing the relation between the National Oil Company and the National Oil Transport Company. The mere fact that the National Oil Transport Company is a subsidiary of the National Oil Company does not disclose their contract relations. The record does not show the corporate purposes of either company, and if any inference is to be drawn from the names of the two companies, it would be to the effect that they are engaged in the oil business and not in the operation of steamships. The stipulation found at page 15 of the record, and the testimony of the witness Matthews,

found at page 50 of the record, should have been excluded upon the objection of appellants. The Court certainly erred in admitting it, as it does not show, or tend in any wise to show or illustrate, the relations between the National Oil Company, and the National Oil Transport Company and the vessel. The mere fact that the National Oil Transport Company assumed to operate the vessel is of itself inadmissible, and this evidence discloses nothing beyond the mere fact of assuming to operate the ship. It is like admitting the declarations of an agent to prove the fact of agency.

There is absolutely nothing in the record to sustain the Court's holding and finding to the effect that the National Oil Transport Company, or the National Oil Company, was owner *pro hac vice.* The contract, as we have seen above, does not contain any hint or suggestion of an operating contract. It goes no further than any ordinary executory contract for the sale of chattels, and it contains within itself a clear statement of the time and circumstances when it becomes a fully executed contract. When the vessel was completed it was to be documented in the name of the buyer and a mortgage given for the purchase price of the hull and the materials for completing it. At that point the contract would become an executed one, and certainly would control and define the relations of the parties no further.

Let us look at the facts and see what happened: The vessel was documented not in the name of the buyer, but in the name of the United States, the real owner, and no mortgage was ever given. The record is absolutely bare of explanation as to how or why this was done. It seems clear that

the only presumption which can be indulged in is that the contract was abandoned and that the real owner of the vessel, through the Fleet Corporation, was controlling it and operating it.

It is to be borne in mind that the affidavit of registry, Exhibit EA to the original Agreed Statement of Facts, discloses that on June 4, 1920, Tory Hedemark made his statutory affidavit of citizenship; that on the same day the authorized official of the Fleet Corporation or Shipping Board made the statutory affidavit of ownership preliminary to registry, swearing that the United States, represented by the Shipping Board, was the owner, and leaving blank the name of the master. This affidavit was filed on the 7th of June, 1920.

It will be observed that in the affidavit of ownership, the blank space for the name of the master is left unfilled. Section 4142 of the Revised Statutes requires that the affidavit for registry shall name the master and state that he is a citizen as well as how he is a citizen. Surely the appellees can not take advantage of their own omission. Particularly is this the case when we remember that at the time of the filing of this affidavit it had endorsed upon it the affidavit of Hedemark, the master, establishing his citizenship. Surely, it must be held that the appellees, by filing this affidavit, adopted, confirmed and approved the appointment of Tory Hedemark as master of the vessel. This can hardly be gainsaid in the face of the fact that the certificate of registry, naming Tory Hedemark as the master, was accepted and carried to sea as a part of the ship's papers and used by the master in his relations with the appellants, as will be hereafter shown.

It certainly will not be contended that the master could not bind the owner of the vessel for the wages of the seamen employed by him as such master.

Sections 4612 and 4525 of the Revised Statutes are both a part of the Shipping Act of June 7, 1872. By Sec. 4612 the term "owner" is defined as "All the several persons, if more than one, to whom the vessel shall belong." By Sec. 4525 it is provided that all seamen shall be entitled to claim and recover their wages of the master or owner in personam. The two provisions are contained in the same statute, and certainly it must be taken that the term "owner" is used in the same sense in both provisions.

It is difficult to see upon what theory the trial court adjudged the relations between the appellees and the National Oil Transport Company to be that of a charter making the latter the owner *pro hac vice.* Even where a charter admittedly exists, there is no presumption that the charterer is owner *pro hac vice.*

The Supreme Court, in the case of *Raymond vs. Tyson,* 58 U. S. 53, Vol. 15 Law Ed. page 51, quotes with approval the following language of Judge Story, used by him in 2 Sumner 597:

"Let us now proceed to the consideration of the terms of the present charter-party, in order to ascertain what is their true meaning and interpretation. If, upon comparing the various clauses, we are led to the conclusion that it is doubtful whether the charterer was intended to have the sole possession and control of the brig during the voyage, or to be constituted owner for the voyage, then the general owner must be deemed such, for his rights and authorities over the voyage must continue, unless displaced by some clear and determined transfer of them."

Bearing in mind the principle here laid down,

how can it be said that the record in this case discloses anything approaching or approximating a charter.

It is abundantly well settled that the owner of a vessel is not liable in personam for supplies where a vessel has been chartered and the charterer employs his own master and buys his own supplies. There are a few cases extending this doctrine to seamen's wages. If these cases are examined, however, it will be found that in every one of them there was a more or less formal operating contract, amounting to a charter. The contract in evidence here, and under which the National Oil Company came into possession of the vessel, has not any of the elements of an operating contract. Indeed, the contract taken altogether completely negatives the theory of an operating contract. It is nothing more nor less than an executory contract of sale, lacking all of the elements of an operating contract.

This language found in the contract, we submit absolutely negatives any theory of operation under this contract, and, of course, negatives any theory of ownership *pro hac vice* in the National Oil Company or its subsidiary the National Oil Transport Company. The language referred to is as follows:

"And it is expressly agreed that the said hulls and bills of materials are delivered into the custody of the buyer for the sole purpose of completion thereof by the buyer. * * * It is expressly agreed that the title to the said hulls and bills of materials, and any additions or improvements made thereto, shall remain in the Fleet Corporation until the same shall be completed and documented and the buyer shall have executed the mortgage and notes hereinafter provided for."

We confidently challenge proctors for appellees to cite a single case of the application of the doctrine of ownership *pro hac vice* not based upon some sort of operating contract, whether formal or informal. Not a case, we say with great confidence, can be found in the books applying the doctrine of ownership *pro hac vice* in favor of the ship owner, except where the controversy arose over some kind or style of operating contract, however formal or informal.

We submit finally that the appellees are absolutely estopped by their own record made in the Custom House at Seattle at the time of the registry of the vessel. The record made in the manner provided by law disclosed the ownership of the S. S. Agron to be in the United States, represented by the Fleet Corporation, and whether the appellants examined this record or not, they may avail themselves of it and take its benefits. Having filed an affidavit, which had endorsed upon it the statutory affidavit of citizenship executed by one purporting to be the master, and having accepted and used a certificate of registry based thereon, which recited that the person making the affidavit was master, the appellees are absolutely estopped to deny the appointment of the master, with all the powers incident to that position, which, of course, included the right to hire seamen as agent of the owner.

The appellees are estopped for another reason: The vessel went to sea with this certificate of registry as a part of the ship's papers, and prior to January 6, 1921, while lying in the port of Iquiqui, South America, the master, being unable to pay the crew on account, as they were entitled

to be paid by law, and the crew being restless and threatening to quit, called together a large portion of the ship's crew and pointed out to them that the vessel was registered in the name of the United States, and inquired if they were afraid of their wages from the Government, and thereupon the men returned to their duties and remained on board until April 15, 1921, when removed by the United States Shipping Commissioner for lack of provisions to maintain them on board. Finding XXV (Record 31).

It is undisputed that the balances due the appellants for wages and expenses of returning home all accrued subsequent to this occurrence. A short calculation will reveal that as to any of the appellants. Clearly, the appellants having remained on board and at their respective stations and performed their duties after this occurrence, the appellees are absolutely estopped to deny the effect of the registration and to dispute their liability in personam to these appellants.

As we understand the proctors for appellees, it is admitted to be the settled law that seamen have a three-fold remedy for their wages, namely, the personal liability of the master, the personal liability of the owner, and their right to proceed in rem against the ship and freight. Indeed, it is difficult to see how it can be contended otherwise in the light of the authorities.

Farrell vs. McLea, 1 Dallas 392; 1 Law Ed. 191.

Sheppard vs. Taylor, 8 Law Ed. 269, 5 Peters 675.

The A. Heaton, 43 Fed. 592-5

Cary vs. The Kitty, Bee's Rep. 255, Vol. 5 Fed. cases, page 59; Case No. 2401

Bronde vs. Haven, Gilpen's Rep. 592; Fed. case No. 1924. Vol. 4, page 211

Hall vs. Hudson, 2 Sprague 65, Fed. case No. 5935. Vol. 11, page 227.
The Dawn, 1 Ware 486-499
The Galloway, Fed. case No. 5204, Vol. 9, page 1111.
Skolfield vs. Potter, 22 Fed. cases, page 299 (No. 12, 925).

As we understand the contention of proctors for appellees, they plant themselves upon the doctrine that the appellees are in the position of mortgagees out of possession, or owners whose vessel is being operated under charter amounting to a demise.

We submit that we have shown that there is no charter in this case. It is our contention that the doctrine of mortgagee and mortgagor has no application here. The only inference or presumption to be drawn from the conduct of the parties from the admitted facts, is that the executory contract was abandoned and the real owner was operating the vessel.

As to the conclusive effect of the oath of registration and the acceptance of the certificate, we cite:

The Dubuque, 7 Fed. cases, page 1141, case No. 4110.

In the case of *Jennie B. Gilkey,* 19 Fed. 127, Judge Lowell discusses the effect to be given the registry or enrollment of a vessel. It is true that in that case the question before the Court was as to the effect of the naming of the home port in the certificate of registry. The principle as applied in that case is exactly the same as the principle involved here, namely, the effect to be given to a certificate of registry. In that case, it was held that the naming of a home port in the certificate of registry establishes the home port of a vessel and

this presumption can only be overcome by clear proof.

The case of *Russell vs. Rackett,* 46 Fed. 200, is extremely close to the case at bar in its facts. In that case, the owner of a vessel made an agreement with the master, by which the latter was to operate the vessel, pay for all supplies and wages, and half the port charges, and the net earnings arising to be equally divided between master and owner. The libelant was hired as mate without knowledge of the arrangement, but later learned of it from the master. He continued in service, and upon discharge, the master gave him a due bill in writing stating that the captain, the vessel and owner owed the mate $90.00 for wages. The wages represented by this statement were earned after the mate learned of the operating arrangement. Thereafter a settlement was had between owner and master before the due bill was presented to the owner. The owner, upon presentation, refused payment and libel in personam against the owner was filed. Held by Judge Brown, in the Southern District of New York, that the owner was liable.

It may be contended that the contract of the libelants was merged in the decree in the United States District Court in the Panama Canal Zone, whereby the vessel was condemned and ordered sold for the payment of the wage claims of the libelants. To that there are several answers. In the first place, the sale was without jurisdiction and wholly void. The master, by timely appearance, suggested to the Court, through his claim and peremtory exception, the ownership of the vessel by the United States, and challenged the jurisdiction of the Court to proceed in rem. Manifestly,

under the Act of March 6, 1920, the Court in proceeding further, was acting wholly in excess of its jurisdiction, and the proceeding was a nullity.

Conceding for the sake of argument that we are wrong in this, we submit that it is the settled law that a contract upon which personal liability exists, is not merged in a decree in a proceeding in rem so as to cut off the further pursuit of the remedy in personam against the party liable.

Durrant vs. Abendroth, 97 N. Y. 132.
Toby vs. Brown, 11 Ark. 308.
Cary vs. The Kitty, Bee's Rep. 254, Fed. case No. 2401, Vol. 5, Fed. cases, page 59.
The Cerro Gordo, 54 Fed. 391.
Boynton vs. Ball, 129 U. S. 457; 30 Law Ed. 986.
Whitney vs. Tibbol, 93 Fed. 686.

To sum the matter up, we earnestly contend that in the absence of explanation, the fact of documenting the vessel, not according to the terms of the executory sale contract but in the name of the United States, the original owner, the Court will conclusively presume that the contract was abandoned, and in the second place, there being no evidence of a charter of any kind or character, or even of the loosest possible operating contract, there is nothing to take the case out of the ordinary situation of the general owner of the vessel being assumed to operate her, and held liable for all her engagements and omissions.

The decree should be reversed and the record sent back with instructions to enter a decree against the United States and the Fleet Corporation, in the amounts due the respective appellants, with statutory interest from the date of filing their several libels and costs.

Respectfully submitted,

JAMES KIEFER,
Proctor for Apellants.